NO.83-958

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1983

PORT OF TACOMA,

Petitioner,

vs.

PUYALLUP INDIAN TRIBE,

Respondent.

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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admission to the Union, applicable to a navigable river located within the boundaries of an Indian reservation, under the following circumstances:

(1) The treaty originally establishing the reservation makes no reference, express or implied, to ownership of the beds and shores of navigable waters;

(2) The treaty does, however, expressly recognize the undisputed historical dependence of the Tribe's members upon fishing, by reserving to them the right to fish at all their usual and accustomed fishing grounds in common with non-Indians;

(3) The river in question was not included within the reservation boundaries as originally established by the treaty, but only within the reservation boundaries as expanded by a subsequent executive order;

(4) The executive order makes no reference, express or implied, to ownership of the beds and shores of the river; and

(5) All uplands adjacent to the river have been alienated to non-Indians.

DECISIONS BELOW

The decision of the Ninth Circuit Court of Appeals affirming the district court's ruling that the bed of the Puyallup River belongs to the Puyallup Tribe is found at 717 F.2d. 1251. The district court opinion is found at 525 F. Supp. 65 (1981).

STATEMENT OF INTEREST OF AMICUS CURIAE

This case involves a dispute over the ownership of a parcel of land which was formerly part of the bed of the Puyallup River in Pierce County, Washington. Through channelization of the Puyallup River, the land is now dry, and is being used by various private

businesses under lease from the petitioner, Port of Tacoma.

Although the State is not a party to this action, its immediate interest is as great as if it were.[1] As the Court of Appeals itself recognized, if the United States does not own the parcel in question in trust for the Puyallup Tribe, then ownership is - or at least was - in the State. See: 717 F.2d at 1258. (Whether the State has lost ownership of the original bed to the Port would have to be resolved, in a separate action, in accordance with applicable state law.)[2]

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1 In the district court, the State took the position that it was a necessary party under Fed. R. Civ. P. 19(a), in a brief as amicus curiae submitted in response to the district court's request. Nevertheless, before any of the existing parties moved to bring the State in as an additional defendant, the district court ruled on the merits. The Court of Appeals upheld the district court's decision to leave the State out. See: 717 F.2d at 1254.

2 In any event, lest there be any

Since the State was not a party, it remains theoretically open to the State to challenge the ownership of the United States in a subsequent action, as the Court of Appeals recognized. Ibid. As a practical matter, however, this present action will be dispositive of the claims of both the State and the Port, since it can hardly be expected that the Court of Appeals will overrule its own determination in this case.

But the State has much more at stake than just the parcel involved here. In the State there are some 25 Indian reservations, with most having navigable rivers running through them or tidelands adjoining them. And the State's title to these aquatic lands is under challenge by

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misunderstanding, the State does not also claim title to the present, channelized, bed of the river under the Equal Footing Doctrine. We do not invoke that doctrine to have both worlds.

the United States and various Indian tribes in other cases besides this one, all pending in the District Court for the Western District of Washington. See: United States v. Burlington Northern Inc., Nos. C76-550V, C77-117V, C78-429V and C80-386V; United States v. Cascade Natural Gas Corporation, No. C82-1443; Suquamish Indian Tribe v. Aam, No. C82-1549V; United States v. Aam, No. C82-1522V.

These aquatic lands are of critical importance to the citizens of Washington because of their ecological, environmental, recreational and economic uses and, therefore, their potential for enhancement of the public good. Such aquatic lands occupy a special legal status as "sovereign" lands which have been recognized by both Congress and this Court. See: Submerged Lands Act, 43 U.S.C. § 1301, et seq. at §

1311(a); Montana v. United States, 450 U.S. 544, 551 (1981); Illinois Central Ry. v. Illinois, 146 U.S. 387, 452, 455 (1892). These special and unique public property interests are the subject of this appeal, and have been placed in serious risk by the decision below. This risk arises from the misreading and misapplication of Montana, supra, by the Court of Appeals. Under the opinion of that Court, Washington's aquatic land base may be substantially diminished simply upon a finding that the waters over those lands provided a major part of the aboriginal diet of the Indians.

This result would occur, as we shall see, even though the language of the treaty or other instrument creating the reservation in no way "definitely declares or otherwise makes plain . . ." an intent to divest the future State of its ownership of these aquatic lands.

Montana v. United States, supra, at 552. Further, this divestiture would occur even though it was in no way necessary to assure this food supply to the Indians at treaty time and is in no way necessary now, because of express treaty guarantees of this food supply. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

REASONS WHY THE WRIT SHOULD ISSUE

A. States receive title to the beds and shores of all navigable waters including those within Indian reservations as sovereign lands unless Congress expresses a contrary intent in a treaty or statute creating an Indian reservation.

1. The Constitutional Starting Point.

In Montana, this Court reaffirmed the principle that the federal government

held the land beneath navigable waters in trust for future states, and that such land would be granted to those states when they entered the Union. This principle is commonly referred to as the Equal Footing Doctrine. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The underpinnings of the Equal Footing Doctrine are: (1) that ownership of land under navigable waters is an incident of sovereignty; and (2) that new states should assume sovereignty and enter the Union on an equal footing with the established states. Montana, supra, 450 U.S. at 551.

The Equal Footing Doctrine, however, has exceptions, all designed to allow the federal government to perform the functions which the Constitution assigns to it. The federal government may deprive future states of the lands to which they would otherwise be entitled if

an international duty or public exigency so requires. United States v. Holt State Bank, 270 U.S. 49, 55 (1926). But because the Equal Footing Doctrine is embodied in the Constitution itself, nothing less will suffice in order to provide an exception to it. It must be definitely clear that Congress intended an exception, and that adequate grounds for the exception exist. United States v. Holt State Bank, supra, 270 U.S. at 55.

2. The Application of Montana to This Case: There is No Clear Indication of Intent to Define the Status of the Bed of the Puyallup River.

In Montana this Court held that the language in the Treaty of Fort Laramie, which prohibited all persons (except government agents) from passing over, settling upon or residing within the reservation, was not strong enough to

overcome the presumption against conveyance of a riverbed even though the river was within the boundaries of an Indian reservation.

Montana is consistent with the rule, also based upon the Equal Footing Doctrine, that general legislation pertaining to public lands does not convey tidelands or beds of navigable waters unless the contrary is clearly indicated. Mann v. Tacoma Land Co., 153 U.S. 273 (1894); McGilvra v. Ross, 215 U.S. 70 (1909).

The Treaty of Medicine Creek involved here and the Treaty of Fort Laramie involved in Montana are "virtually identical". Montana, supra, 450 U.S. at 560. The conclusion inevitably follows that the Treaty of Medicine Creek similarly lacks the specific language necessary to have conveyed the bed and shores of the

Puyallup River to the Puyallup Tribe contrary to the decision of the court below.

The United States, of course, could cede to an Indian tribe beds and shores of navigable waters held by it as the paramount sovereign, under the exceptions to the Equal Footing Doctrine. Shively v. Bowlby, 152 U.S. 1, 48 (1894). The critical questions here are: (1) Did the United States clearly intend to do so? (2) Was there a public exigency for so doing?

When in 1857 the President of the United States set aside the enlarged Puyallup Reservation which encompassed the Puyallup River he used no language reserving for the Tribe submerged lands lying beneath navigable waters. Executive Order, January 20, 1857. 1 Kappler 922 (1904). Yet the Puyallup Tribe was a political body for whom the

3. The "Public Exigency" Issue.

Neither the Court of Appeals nor the district court actually purported to find in the Treaty or Executive Order what obviously is not there: a clear expression of intent that the riverbed is to belong to the Tribe. As candidly admitted by the district court:

> "The court is aware that there is no language in the Treaty of Medicine Creek of 1854 and 1855 or in the Executive Order of January 20, 1857 that definitely declares or otherwise makes plain any intention to convey, nor are there any express conveyances that expressly conveyed or referred to the bed of the Puyallup River." 525 F. Supp. at 68.

The court below, following the district court's approach, avoided this embarrassing problem by invoking the shibboleth of "public exigency" based upon the notion that the Executive Order of January 20, 1857 was intended to avoid war between the Puyallup and the white

settlers then moving into Washington Territory. Whether the enlarged reservation established by Executive Order was necessary in order to avoid war is not the issue, however, even under that theory. The issue, rather, is whether it was necessary to give the Tribe the bed of the Puyallup River within the boundaries of that reservation in order to avoid war. And neither the opinion of the court below nor that of the district court purport to show that it was.

The second way the court below sought to shelter its conclusion under the "public exigency" exception to the general rule was by pointing to the dependence of the Puyallups upon fishing as a source of food and as a part of their lifestyle. That such dependence existed we do not dispute. But this reasoning is fallacious, nevertheless,

because Article III of the Treaty of Medicine Creek secures fishing rights to these Indians to take up to fifty percent of anadramous fish runs passing through traditional fishing grounds. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976). The decision to allocate fish runs between Indians and other citizens was substantially upheld by this Court in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). There was no need or "exigency" for Indians to receive title to the beds and shores of navigable waters to further their fishing activities or protect their fishing rights.

In addition, we would suggest that if the court below is correct in its conclusion (i.e., that historic

dependence upon fishing by Indians overcomes the presumption against conveyance of such aquatic lands to a state) the Equal Footing Doctrine will be in large part inapplicable to the State of Washington. As previously stated, many of the twenty-five Indian reservations in the State of Washington include portions of navigable rivers within their boundaries and have adjoining tidelands. Most if not all of the tribes have historically used the rivers and tidelands as food sources to some extent. Under the Ninth Circuit's approach, many of these rivers and much of the tidelands would be subject to claims of Indian ownership simply because of this historical fact.

The lower court opinion relies heavily upon Alaska Pacific Fisheries v. Untied States, 248 U.S. 78 (1918), which construed an Act of Congress

setting aside for Indian use "the body of lands known as Annette Islands" in the then Territory of Alaska. The Indians who were given the Annette Islands as a home had previously migrated from British Columbia. The requisite congressional intent to convey to them the beds and shores of adjacent waters was based upon the notion that to exclude such fishing areas would defeat their ability to obtain a food supply and a livelihood. For these Indians, unlike the Puyallups and many other Washington tribes, had no treaty right to fish anywhere and thus had no treaty guaranty of a livelihood. This circumstance provided the basis for imputing an intention to Congress "to conform its action to their situation and needs". 248 U.S. at 89.

The lower court's reliance upon Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), is similarly misplaced. Choctaw

interpreted the Treaty of Dancing Rabbit Creek which said that the described tribal lands would not become a part of any state or territory. Requisite intent was found, based on this language, to convey title to the beds of a navigable river in fee simple to the Indians. 397 U.S. at 625.[4]

B. Rulings by the Courts of Appeals have reached inconsistent results in applying Montana's rationale.

The Seventh Circuit Court of Appeals has interpreted the Montana case as a reaffirmation of the Equal Footing Doctrine. Thus, in Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983), it affirmed a lower court judgment that the 1854 Chippewa Treaty did not confer upon the Indians the exclusive right to fish and hunt in the waters of navigable lakes

4 Montana distinguishes the Choctaw decision on this very ground. 450 U.S. at 455-56, n. 5.

within the boundaries of the reservation. The Seventh Circuit concluded that neither the language nor history of the Chippewa Treaty was sufficient to overcome the presumption against conveyance of the lake bed. Baker, supra, 698 F.2d at 1335.

The Ninth Circuit's interpretation of Montana in this case is inconsistent with the Seventh Circuit decision in Baker.

Further, the Ninth Circuit's interpretation of Montana is not consistent within the Circuit itself. This should be of no concern of this Court, we would agree, were it not for the fact that this inconsistency involves a pivotal question. The normal canon of construction for treaties, statutes, and other instruments involving Indians is that they are to be construed as the Indians understood them and that

ambiguities are to be resolved in the Indians' favor. Does this canon apply in cases such as this involving a state's claim to aquatic lands under the Equal Footing Doctrine? In United States v. Aranson, 696 F.2d 654 (9th Cir. 1983), cert. den. ____ U.S. ____, 104 S. Ct. 423 (1983), another panel of the Ninth Circuit held that this canon did not apply.[5]

In contrast, the panel in this case

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5 As stated by the panel in Aranson: "Turning to the facts in the present case, even the strongest language in the various official documents defining the reservation's western boundary fall short of the specificity required by Montana. We conceded in our earlier opinion (subsequently withdrawn by the panel for reconsideration in light of Montana) that the first Executive Order issued in 1873 delineating the bounds of the reservation as ambiguous. It established the western boundary of the reservation only vaguely as 'bounded on the west by the Colorado River'. We nevertheless construed the ambiguity in favor of the tribes - an approach Montana rejects." 696 F.2d at 644.

holds that this canon of construction is applicable in these cases, stating:

> "Nor did it [the Court in Montana] gainsay the equally important proposition set forth in Choctaw Nation that 'treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor.'" 717 F.2d at 1257.

Because this critical difference has such historical importance in resolving not only this case, but similar disputes which are either now pending or likely to arise in the future, this issue now ought to be resolved by this Court.

C. Executive Orders do not convey title to Indian tribes.

The court below also erred by concluding that the Executive Order of January 20, 1857 conveyed title to the Puyallup Indians. 717 F.2d at 1261, n. 10. This Court has repeatedly ruled that Executive Orders do not convey title

to lands set aside for Indians. Hynes v. Grimes Packing Co., 337 U.S. 86 (1949); Sioux Tribe v. United States, 316 U.S. 317 (1942).

D. The decision of the court below is contrary to the decision of this Court in Puyallup III.

The ownership of the bed of the Puyallup River is an issue that has already been before this Court. In Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (1977), (Puyallup III), a central issue was the applicability of the "exclusive use" language of Article II of the Treaty of Medicine Creek to lands within the reservation and to the Puyallup River itself. As stated by the Court:

> "The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation.
>
> . . .

> "Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be 'set apart, and, so far as necessary, surveyed and marked out for their exclusive use' and that no 'white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent.' It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use'." 433 U.S. 173, 174.

In footnote 12, the Court had more to say about the river:

> "Counsel for petitioner [Puyallup Tribe] intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr of Oral Arg 10. This contention is at odds with the otherwise uncontradicted findings below." [i.e., the findings that all but 22 acres had been alienated]

Yet the Court of Appeals - and the